IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 549 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHANTI PRAKASH DYEING & PRINTING MILLS PVT. LTD.
Versus
UNION OF INDIA

Appearance:
1. Special Civil Application No. 549 of 2004
MS AMRITA M THAKORE for Petitioner No. 1-2
MS DHARMISHTA RAVAL for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 06/05/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

Rule. Ms. Dharmishta N. Raval, learned senior standing counsel for the Central Government, waives

service of notice of Rule on behalf of the respondents.

In the facts and circumstances of the case, the petition is taken up for final disposal today.

2. What is challenged in this petition under Article 226 of the Constitution is -

(i) the order dated 24.11.2000 (Annexure 'B' to the petition) passed by the Deputy Commissioner of Central Excise, Division -III, Surat-I determining capacity of production of petitioner No.1 Unit for the period from 16.12.1998 to 31.3.1999 and for the period from 1.4.1999 to 29.2.2000 under section 3A of the Central Excise Act, 1944 ('the Act' for short) read with Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules 1998 and Rules 2000 ('the Rules' for short), and

(ii) similar order dated 9.2.2001 for the period from 1.4.2000 to 31.3.2001 (also at Annexure "B" to the petition).

The orders are challenged mainly on the ground that they were passed without issuing any show cause notice or without giving the petitioners any opportunity of being heard.

On merits, it is submitted that the Honourable Supreme Court has held in Commissioner of Central Excise v. SPBL Limited 2002 (146) ELT 254 (SC) that length of galleries is not to be taken into consideration for determining the annual capacity of production in view of the aforesaid Rules.

3. Ms. DN Raval, learned senior standing counsel for the respondents, has submitted that since the orders were passed in November 2000/February 2001 but were not challenged for almost three years, this petition may not be entertained at this stage.

4. From the affidavit-in-rejoinder, the learned counsel for the petitioners points out that aggrieved by the demand of excise duty on the basis of the aforesaid determination, the petitioners had filed a claim for refund and by order dated 31.12.2001 the Commissioner of Appeals, Central Excise and Customs, Surat, had even allowed the petitioners' appeal holding that the question of demanding any duty taking into consideration the galleries is illegal since galleries are not includable

for determining duty. However, notwithstanding the said order of the Commissioner (Appeals) (which has been carried by the Department in appeal before the CEGAT), the Deputy Commissioner of Central Excise, Division-III, Surat I has passed an order on 26.3.2003 rejecting the petitioners' claim for refund of Rs.6,80,620/- on the ground that the petitioners had not challenged the determination order dated 24.11.2000 and therefore the petitioners are not entitled to any relief which would run counter to the said determination order dated 24.11.2000, relying on the judgment of the Honourable Supreme Court in Mafatlal Industries Limited, 1997 (89) ELT 247 laying down that a person whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment of levy has become final in his case, he cannot seek to reopen it nor can he claim refund without reopening such assessment/order on the ground of decision of another person's case.

5. Having heard the learned counsel for the parties, it appears to this Court that the main controversy is about the petitioners' liability to pay duty for the relevant period under Section 3A of the Act i.e., examination of the petitioners' claim for the refund of the amount of Rs.6,80,620/- for the relevant time depends upon the determination order dated 24.11.2000 which was passed without giving the petitioners any opportunity of being heard and obviously suffers from the violation of principles of natural justice.

6. It is true that at first blush it may appear that the challenge is delayed but the petitioners had agitated this issue before the Commissioner of Central Excise and Customs in 2001 itself by challenging the order dated 29.12.2000 based on the order dated 24.11.2000 and by order dated 31.12.2001 the Commissioner (Appeals) upheld the petitioners' challenge and held that galleries are not to be included for determining the duty and therefore question of demanding duty for galleries will not arise. That finding was given in favour of the petitioners way back in December 2001. Hence it cannot be said that the petitioners had acquiesced in the order including galleries for the purpose of determination of the petitioners' annual production capacity. In this view of the matter, there is no impediment to the petitioner challenging the said order dated 24.11.2000 on merits.

7. Accordingly the petition is allowed. The impugned orders dated 24.11.2000 and 9.2.2001 (Annexure B Colly. to the petition) are quashed and set aside only

on the ground that the same were passed without giving the petitioners any opportunity of being heard. Hence respondent No.2 will be at liberty to pass fresh orders for determination of the petitioners' annual production capacity for the periods covered by the orders dated 24.11.2000 and 9.2.2001 after giving the petitioners an opportunity of being heard.

Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

(karan)